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No. 78-1688

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITY COUNCIL OF THE CITY OF PHILADELPHIA, ET AL., PETITIONERS

v.

RESIDENT ADVISORY BOARD OF PHILADELPHIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the district court (Pet. App. A-12 to A-28) is reported at 463 F. Supp. 694. The order of the court of appeals (Pet. App. A-32 to A-35) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-32 to A-35) was entered on March 7, 1979. A petition for rehearing was denied on April 2, 1979 (Pet. App. A-36). The petition for a writ of certiorari was filed on May 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court was required to relieve petitioners from the court's earlier injunction against interference with construction of a low income housing project.

STATEMENT

This litigation had its antecedents in 1957, when the Philadelphia Housing Authority (PHA) and the predecessor of the Department of Housing and Urban Development (HUD) signed a contract authorizing PHA to begin development of a federally-financed public housing project in the Whitman section of Philadelphia (Pet. App. A-14). The project was stalled in its early stages by local opposition, however, and at least one developer refused to carry out its contract to build the project (Pet. App. A-15 to A-17). In 1970 the Mayor and City Council of Philadelphia approved a new plan to build townhouses on the site, a new developer was awarded the contract, and construction began. Continued local opposition and modifications to the contract further delayed progress (Pet. App. A-17 to A-18). In 1972 Mayor Rizzo ordered the project terminated, and the City of Philadelphia paid the builder $806,000 in cancellation costs (Pet. App. A-18).

The Resident Advisory Board, a community organization representing residents eligible for housing in the townhouse project, brought suit against the mayor and others, alleging that cancellation of the project was in violation of the Civil Rights Acts of 1866 and 1871, 42 U.S.C. 1981 *et seq.*; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*; and the Fifth, Thirteenth and Fourteenth Amendments. The United States District Court for the Eastern

District of Pennsylvania, after a 57-day trial, found that the City of Philadelphia had "acted with a racially discriminatory purpose" in cancelling the project, that cancellation had "a racially discriminatory effect" on the plaintiffs, and that the plaintiffs were entitled to relief under the statutory and constitutional provisions cited. *Resident Advisory Board* v. *Rizzo*, 425 F. Supp. 987, 1013 (E.D. Pa. 1976). On November 5, 1976, the district court ordered PHA, the City of Philadelphia, HUD and other defendants "immediately [to] take all necessary steps for the construction of the Whitman Park Townhouse Project as planned." *Id.* at 1029. The court of appeals affirmed, 564 F. 2d 126 (3d Cir. 1977), and this Court denied certiorari. 435 U.S. 908 (1978).

Following this Court's denial of certiorari, the district court met with all parties and issued an order (Pet. App. A-24 to A-25) setting deadlines for the various steps " 'required to complete construction of the 120 townhouses, pursuant to the Court's Order of November 5, 1976' " (Pet. App. A-25). On December 21, 1978, however, the City Council of Philadelphia disapproved the townhouse project and passed a resolution requesting the Philadelphia Redevelopment Authority to prepare plans for the development of "not less than 250 dwelling units on scattered sites within the Whitman Urban Renewal Area * * *" (Pet. App. A-12).

The City of Philadelphia then moved under Fed. R. Civ. P. 60(b)(5) and (6) to amend the district court's order of November 5, 1976, to allow construction of scattered-site housing in place of the townhouse project. The district court refused to modify its order (Pet. App. A-12 to A-28). It held (Pet. App. A-26 to

A-27) that the City had "failed to present any reason sufficient to justify relief from the operation of" the court's original judgment and that the question whether the original townhouse plan must go forward was *res judicata*. The court ordered that "the townhouses shall be constructed as ordered by this Court on November 5, 1976 * * *" (Pet. App. A-28).

The court of appeals affirmed without opinion (Pet. App. A-32 to A-35).

ARGUMENT

The district court's order is correct, and petitioners present no issue warranting this Court's review.

1. Contrary to petitioners' contention (Pet. 20-26), the district court did not improperly ignore the Pennsylvania Urban Redevelopment Law, Pa. ~~STAT.~~ Stat. Ann. tit. 35, § 1710(j) (Purdon) (see Pet. App. A-38). That law authorizes a "governing body" to approve a redevelopment contract and, under normal circumstances, presumably would enable petitioners to authorize scattered-site housing rather than townhouses. But this issue of state law does not call for review. *Butner* v. *United States*, No. 77-1410 (Feb. 21, 1979), slip op. 9. And neither that state law nor any other can enable petitioners to evade a lawful decree of a federal court. As the district court noted (Pet. App. A-26), the townhouse project was not the court's doing; it was approved by the Mayor and City Council in 1970. The Mayor's attempt to cancel that project was fully litigated and found to be in violation of federal law. The district court ordered the project reinstated, the court of appeals affirmed, and this Court denied

certiorari. Petitioners cannot now pretend that that litigation never occurred; they are bound by it.[1]

By the same token, petitioners' argument (Pet. 21) that the scattered-site plan will have no adverse effect on the class represented by the Resident Advisory Board—the plaintiff in the original litigation—is irrelevant. Petitioners are not free to disregard the district court's original order and substitute some other plan more to their liking, and they are not free to second-guess the class about the class's own interests.

2. Similarly without merit is petitioners' contention (Pet. 27-31) that the district court's refusal to modify its original judgment conflicts with various decisions of this Court because it allegedly exceeds the court's equity jurisdiction (Pet. 27), usurps legislative authority (Pet. 28-29), or grants injunctive relief without a hearing (Pet. 29-31). The district court did no more than refuse to grant petitioners the relief they sought from the court's original decree. The propriety of the relief ordered by that decree was fully litigated in a 57-day trial and thoroughly reviewed on appeal.[2] Petitioners have not shown the existence of the kind of grievous injustice that would call for modification of

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[1]Petitioners argue (Pet. 21-22) that Paragraph 15 of the implementation order issued after this Court's denial of certiorari (see Pet. App. A-24) authorized the City Council's action here. But that paragraph merely ordered that the City Council "expeditiously consider the new redeveloper and redevelopment contract" and take final action by a certain date. It did not authorize the City Council to cancel the townhouse project entirely. At all events, the district court is in the best position to interpret the meaning of its own order.

[2]See also *Sworob* v. *Harris*, 451 F. Supp. 96 (E.D. Pa.), aff'd, 578 F. 2d 1376 (3d Cir. 1978), cert. denied, No. 78-557 (Jan. 8, 1979).

the decree. *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). The present litigation is nothing more than an attempt by petitioners to avoid the day of reckoning that the district court's original decree requires, and the court was well within its discretion in refusing to modify its order. See, *e.g.*, *Martella* v. *Marine Cooks & Stewards Union*, 448 F. 2d 729 (9th Cir. 1971), cert. denied, 405 U.S. 974 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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